

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
MILTON H. BOHART,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
and MARGARET COCHRAN

Respondents.

PCHB Nos. 82-173 and 82-174

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of two Washington State Department of Ecology Reports of Examinations and Orders denying that permits be issued on Surface Water Application No. S4-27498 and Ground Water Application No. G4-27497, were consolidated and came before the Pollution Control Hearings Board for formal hearing on March 15, 1983, in Lacey, Washington. Seated for and as the Board were Gayle Rothrock, Chairman (presiding), David Akana, Lawyer Member, and Lawrence J. Faulk, Member. The proceedings were recorded by Duane Lodell.

1 Appellant, Milton H. Bohart of Seattle, Washington, represented
2 himself. Respondent, Department of Ecology (DOE), was represented by
3 Patricia Hickey O'Brien, Assistant Attorney General for DOE at
4 Olympia, Washington. Margaret Cochran of Wenatchee, Washington, moved
5 to intervene at the opening of the hearing and represented herself.

6 Witnesses were sworn and testified. Exhibits were admitted and
7 examined. Oral and written argument were taken into the record. From
8 the testimony, evidence and argument, the Board makes these

9 FINDINGS OF FACT

10 I

11 On May 27, 1981, appellant filed Application No. S4-27498 with DOE
12 to appropriate public surface waters. On that same date, appellant
13 filed Application No. G4-27497 to appropriate public ground waters.
14 Public notice was made, and on July 13, 1981, a protest to granting
15 either request was received by DOE from Respondent-Intervenor Margaret
16 Cochran and her brother Joseph W. Hedges.

17 II

18 Application No. G4-27497 requested 20 gallons per minute (gpm)
19 from a well for domestic supply for one home and for irrigation of 12
20 acres. This water was to be used on appellant's undeveloped 20-acre
21 parcel located in the SW 1/4 of the SW 1/4 of Section 26, Chelan
22 County.

23 Application No. S4-27498 requested .04 cubic foot per second (cfs)
24 from an unnamed spring for domestic supply for one home, stockwater
25 and the irrigation of 5 acres. This water was to be used on a 5.68

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1 acre, undeveloped parcel also owned by appellant which is located in
2 the NW 1/4 of the NW 1/4 of Section 35, Chelan County.

3 Both parcels were acquired from appellant's parents. During the
4 summer months the parcels are rotated as grazing area for two horses.
5 Appellant's priorities of water use on both parcels are stockwatering,
6 domestic supply and irrigation, in that order.

7 III

8 Appellant's two parcels lie at the head of Cummings Canyon which
9 supports a creek that generally flows year-round, although during
10 years of extreme low precipitation does experience short intermittent
11 flow periods. The area receives most of its moisture in the form of
12 snowfall and wastewater runoff from the Wenatchee Heights Reclamation
13 District located above the Canyon.

14 IV

15 Pursuant to chapter 90.03 RCW, Cummings Canyon Creek and its
16 tributaries were adjudicated in 1967 in the Superior Court of Chelan
17 County. Flow of the creek during normal years was found to range from
18 .16 to .84 cfs. During years of unusually low precipitation, flows of
19 less than .16 cfs occur. Water rights were confirmed for eight
20 claimants and totaled .53 cfs for eight stockwater uses, two domestic
21 supplies and the irrigation of 28 acres.

22 V

23 At the adjudication, appellant's predecessors in interest claimed
24 .01 cfs for domestic supply for the 5.68-acre parcel (the subject of
25 Application No. S4-27498). The claim was based on Certificate of

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1 Water Right No. 7175 issued in 1958. Testimony at the adjudication
2 showed that the appropriation was never perfected, and the claim was
3 denied. A Notice of Cancellation concerning that right was issued and
4 recorded in 1974.

5 VI

6 The Wenatchee Heights Reclamation District supplies irrigation
7 water to most of the irrigated land located above Cummings Canyon in
8 an area known as Wenatchee Heights. The District's system was
9 constructed in the 1920's and consisted mainly of open ditches and
10 wood-staved pipes. A conveyance loss of approximately 45 percent
11 results from this type of system. This loss contributed to the flow
12 of Cummings Canyon Creek. When conveying water to the last user on
13 each line, the District would convey more water than was actually
14 delivered. This unused water was spilled out of the end of the
15 pipes. Two or three of these pipes ended above Cummings Canyon and
16 this water also contributed to the flow of Cummings Canyon Creek. The
17 conveyance loss and the spillage were part of the .16 to .84 cfs flow
18 of the creek recorded during the 1967 Adjudication.

19 VII

20 In 1978, the District went through a rehabilitation project and
21 replaced the old system with closed pressurized pipeline. As a result
22 of the rehabilitation, much of the conveyance loss was eliminated and
23 the spillover of excess water no longer exists. The more efficient
24 system has significantly reduced the flow of Cummings Canyon Creek.
25 The exact amount of reduction is unknown.

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VIII

Chelan County Public Utility District (PUD) furnishes water for domestic use to residents in Wenatchee Heights. Both of appellant's parcels are located within the PUD, and water for domestic use is available to him.

Appellant's 5.68-acre parcel (the subject of Application No. S4-27498) lies within the Reclamation District and can be furnished with irrigation water. Appellant's 20-acre parcel lies outside the District.

IX

Respondent-Intervenor, Margaret Cochran, jointly with her brother Joseph Hedges, are entitled to use .01 cfs of water from Cummings Canyon Creek for the purpose of domestic supply and stockwater. They are also entitled to .47 cfs of water from the creek for the purpose of irrigation of 28 acres. These rights were confirmed by the adjudication of Cummings Canyon Creek and have number one priority.

Respondent-Intervenor at one time did irrigate the full 28 acres but now irrigates only 11 acres. The reason for this decrease in irrigated acres is the decrease of water in the creek. Mrs. Cochran is the last user on the creek and exhausts all the water to irrigate those 11 acres. She has noticed a decrease in the flow of the creek since the completion of the rehabilitation of the Reclamation District's system.

Respondent-Intervenor's land lies outside the Reclamation District and the PUD. The only sources of water available for the respondent

1 are the Cummings Canyon Creek and two unnamed springs located on her
2 land.

3 X

4 On July 13, 1982, representatives of DOE conducted a field
5 investigation on appellant's parcels in order to determine whether to
6 approve or deny his applications. Reports of examination were filed
7 and approved by the Department's Regional Supervisor. The conclusions
8 reached in the reports stated that during normal years, the creek's
9 flow fluctuates to a flow less than what is needed to satisfy existing
10 rights. The DOE determined that if the appellant's proposed uses were
11 developed, they would have an adverse effect on existing rights and
12 granting either permit would be contrary to the public interest.
13 Application Nos. G4-27497 and S4-27498 were denied. Appellant was
14 told he could continue his riparian stockwater practice without the
15 benefit of a water right with respect to the 5.68-acre parcel (the
16 subject of application No. S4-27498).

17 XI

18 Feeling aggrieved by the decision of DOE, appellant filed an
19 appeal with this Board and the matter came to formal hearing.

20 XII

21 Any Conclusion of Law which should be deemed a Finding of Fact is
22 hereby adopted as such.

23 From these Findings of Fact, the Board comes to these
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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the persons and subject matter of
4 this proceeding. RCW 43.21B.110.

5 II

6 This matter has come before this Board to determine whether DOE
7 was correct in denying appellant's applications to appropriate public
8 surface and ground waters.

9 The legislature has found that, subject to existing rights, all
10 waters within the state belong to the public and any right thereto
11 shall be acquired by appropriation for a beneficial use and in the
12 manner provided and not otherwise. As between appropriators, the
13 first in time shall be the first in right. RCW 90.03.010

14 III

15 Chapter 90.03 RCW deals with the appropriation of public surface
16 waters. Chapter 90.44 RCW deals with the regulation of public ground
17 waters and is supplemental to chapter 90.03 RCW. RCW 90.44.020. The
18 application procedure for the appropriation of public surface water is
19 defined in RCW 90.03.250 through 90.03.340. Applications for permits
20 to appropriate ground water are made in the same form and manner. RCW
21 90.44.060. Appellant has followed the proper procedure for both his
22 applications.

23 IV

24 After the appellant applied for his permits, it was the duty of
25 DOE to investigate the applications and determine what water, if any,

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1 was available for appropriation. RCW 90.03.290 provides in part:

2 But where there is no unappropriated water in the
3 proposed source of supply, or where the proposed use
4 conflicts with existing rights, or threatens to prove
5 detrimental to the public interest, having due regard
6 to the highest feasible development of the use of the
7 water belonging to the public, it shall be duty of the
8 supervisor to reject such application and to refuse to
9 issue the permit asked for.

10 The DOE concluded that if appellant's requested uses were
11 approved, they would impair existing rights and would be contrary to
12 the public interest. This conclusion was based on the statements of a
13 senior appropriator and largest user of water in the Cummings Canyon
14 Creek drainage area and on the fact that the Wenatchee Heights
15 Reclamation District located above the Canyon was recently
16 rehabilitated.

17 V

18 The denial of appellant's applications Nos. G4-27497 and S4-27498
19 should be affirmed.

20 VI

21 Appellant stated that his priorities of uses for water on both of
22 his parcels of land were stockwater, domestic and irrigation.

23 RCW 90.03.010 provides that nothing contained in the Water Code
24 (Chapter 90.03 RCW) shall be construed to lessen, enlarge or modify
25 the existing rights of any riparian owner. Consistent with this
26 mandate, DOE, in addressing appellant's surface water application,
27 concluded that the appellant could continue his riparian stockwater
practice without the benefit of a permit or perfected water right.

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1 The Board found that appellant's 5.68-acre parcel lies within the
2 Public Utility District for Chelan County which makes water available
3 for domestic use. This same parcel also lies within the Wenatchee
4 Heights Reclamation District which supplies irrigation water.

5 Appellant's application for ground water concerned a 20-acre
6 parcel located just outside the Reclamation District, therefore,
7 irrigation water provided by the District is not available to this
8 parcel at this time. Concerning appellant's other proposed uses, RCW
9 90.44.050 provides in part:

10 That any withdrawal of public ground waters for
11 stockwatering purposes, or for the watering of a lawn
12 or of a noncommercial garden not exceeding one-half
13 acre in area, or for single or group domestic uses in
14 an amount not exceeding five thousand gallons a day,
15 or for an industrial purpose in an amount not
exceeding five thousand gallons a day, is and shall be
exempt from the provisions of this section but, to the
extent that it is regularly used beneficially, shall
be entitled to a right equal to that established by a
permit issued under the provisions of this chapter.

16 Appellant would not need a permit to withdraw public ground water for
17 such purposes. Such withdrawal would be subject to regulation during
18 periods of scarce resources, however.

19 VII

20 Any Finding of Fact which should be deemed a Conclusion of Law is
21 hereby adopted as such.

22 From these Conclusions the Board enters this
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ORDER


The Washington State Department of Ecology Orders denying Application Nos. S4-27498 and G4-27497 for permits to appropriate public waters are hereby affirmed.

DONE this 10th day of May, 1983, at Lacey, Washington.

POLLUTION CONTROL HEARINGS BOARD


GAYLE ROTHROCK, Chairman


DAVID AKANA, Lawyer Member


LAWRENCE J. FAULK, Member